# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-915

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DANIEL WYATT, PETITIONER

*v.*

IMMIGRATION AND NATURALIZATION SERVICE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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**MEMORANDUM FOR THE RESPONDENT IN OPPOSITION**

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Petitioner, an alien, challenges an order of deportation on the ground that the conviction on which it is based violated his privilege against self-incrimination. Petitioner is a native and citizen of Ireland who has resided continuously in the United States since his admission for permanent residence on July 22, 1964 (R. 8).[1] On September 27, 1968, he pleaded guilty in

[1] No record accompanied the petition for certiorari, which seeks review of the dismissal by the court of appeals of a second petition for review of a deportation order. The order is based on a criminal

the United States District Court for the Southern District of Texas to the third count of a three-count indictment, charging that he transported and concealed a quantity of marihuana without having paid the required transfer tax, in violation of former 26 U.S.C. 4744(a)(2) (R. 1-5).[2]

1. Before accepting the guilty plea, the court advised petitioner, in the presence of his counsel:[3]

> I also feel it my duty to tell you that as to the third count of the indictment you have a possible defense available to you if you desire to assert your rights against self-incrimination, a right under the Fifth Amendment to the Constitution. If you plead guilty, you will be waiving that right, and I want you to do it knowingly and aware that it is available to you. Is that the case?

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conviction which petitioner unsuccessfully sought to have vacated by the sentencing court following the court of appeals' affirmance of the order in the first review proceeding. We have secured copies of the relevant documents, assembled them chronologically, and numbered the upper right-hand corners of the pages to facilitate reference. "R." refers to the informal record, which we are lodging herewith.

[2] This was the offense with respect to which this Court, eight months later, in *Leary* v. *United States*, 395 U.S. 6, held that a timely and proper assertion by a defendant of his Fifth Amendment privilege against self-incrimination is a complete defense (395 U.S. at 12-29).

[3] The arraignment occurred eight months after the decisions in *Marchetti* v. *United States*, 390 U.S. 39, *Grosso* v. *United States*, 390 U.S. 62, and *Haynes* v. *United States*, 390 U.S. 85, in which this Court had held that the Fifth Amendment privilege (if not waived and if seasonably asserted) is a defense to prosecutions under similar statutes.

Petitioner then expressly acknowledged that he was waiving his Fifth Amendment right and reaffirmed his desire to plead guilty (R. 4-5). On December 10, 1968, petitioner was sentenced to five years' imprisonment, execution of the sentence was suspended, and he was placed on unsupervised probation for five years. The court recommended that petitioner be deported from the United States and that he not be allowed to make application for return during the probationary period (R. 6). The court contemporaneously, on motion of the government, dismissed the other two counts of the indictment, each of which charged a more severely punishable offense than that to which petitioner had pleaded guilty (R. 1, 6).[4]

2. On October 24, 1969, on the basis of this conviction, petitioner was ordered deported as an alien who had been convicted of a violation of a law governing the taxing or transportation of marihuana (see 8 U.S.C. 1251(a)(11)), and on July 31, 1970, an appeal by petitioner from the order was dismissed by the Board of Immigration Appeals (R. 7-11).[5]

On September 28, 1970, petitioner filed in the court

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[4] The offense to which petitioner pleaded guilty was punishable by not less than two nor more than ten years' imprisonment (plus an optional fine of not more than $20,000); suspension of sentence and probation were available (former 26 U.S.C. 4744(a)(2) and 7237(a)). The dismissed counts, charging smuggling and illegally transporting twenty pounds of marihuana in violation of former 21 U.S.C. 176a, carried a mandatory prison term of not less than five nor more than twenty years' imprisonment (plus a fine), without possibility of suspension of sentence or probation (former 26 U.S.C. 7237(d)).

[5] A prior deportation order had been vacated by the court of appeals for reasons not now relevant (R. 8-9).

of appeals a petition for review of the deportation order, pursuant to 8 U.S.C. 1105a, contending that the order was void under Leary v. United States, 395 U.S. 6 (see note 2, *supra*) (R. 12-14). The Immigration and Naturalization Service, in reply, noted that petitioner's conviction was still outstanding, that it made him expressly deportable under Section 1251(a)(11), and that his proper course, if he believed the conviction constitutionally vulnerable, was to seek to have it vacated by the court in which it had been entered, pursuant to 28 U.S.C. 2255. If he succeeded, the Service observed, he could move to have the deportation order administratively vacated, in reopened proceedings, as no longer having a foundation in the record (R. 22-23). On February 22, 1971, the court of appeals affirmed the deportation order without opinion (R. 27; 439 F. 2d 152).

3. On June 3, 1971, petitioner filed in the district court a motion under Section 2255 to vacate his conviction on the ground that it was void under *Leary* (R. 28-31). On August 4, 1971, the court, in a memorandum opinion, denied the motion on the ground that petitioner, in the course of pleading guilty, had expressly waived his Fifth Amendment privilege (R. 32-35).

On August 30, 1971, petitioner filed a notice of appeal from the denial of the Section 2255 motion (R. 36) and, noting that he was facing imminent deportation, filed in the court of appeals a motion for a stay of deportation pending the appeal (R. 37-38). On the same day, the clerk of the district court transmitted the record of the Section 2255 proceeding to the court of appeals. On September 9, 1971, the court of appeals (*per* Circuit

Judges Coleman and Simpson) denied the requested stay without opinion (R. 39) and the clerk of the court of appeals returned the record to the district court with a copy of the order (R. 40). The accompanying letter of transmittal, a copy of which was sent to petitioner's counsel, advised the district court clerk that at the direction of the court of appeals "the record on appeal, which was forwarded by your office directly to Judge Coleman, is being returned herewith" (R. 40). Petitioner did not further prosecute his appeal at that time.

4. Ten and a half months later, on July 28, 1972, petitioner filed in the court of appeals a second petition for review of the deportation order (R. 41-45). Noting that he was facing imminent deportation (R. 42),[6] petitioner again claimed that the order was void under *Leary* (R. 42-43). Acknowledging that the court had upheld the order 17 months previously in the first review proceeding, he asked the court to reconsider its prior action in the light of intervening decisions which he claimed to be relevant (R. 43-45). The petition also referred to his unsuccessful effort in the interim to have the district court vacate the conviction, and urged that the denial of that motion had been error (R. 43-44).

The Service moved to dismiss the petition, contending that it was frivolous and had been filed merely to delay enforcement of the deportation order (R. 46-49). In tracing the antecedent proceedings, the Service re-

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[6] Service of the petition stayed enforcement of the order. 8 U.S.C. 1105a(3). The record does not show why petitioner had not been deported following the denial of a stay by the court of appeals in September 1971.

ferred to the court of appeals' order of September 9, 1971,[1] denying the requested stay of deportation pending appeal from the denial of the motion to vacate, as having "denied the appeal by * * * [denying the stay]" (R. 48). In a reply to the motion to dismiss (R. 50-51), petitioner disputed the Service's characterization of the order, stating that although the court of appeals had denied his application for a stay it had not ruled on the merits of his constitutional claim (R. 50). Noting that the record of the Section 2255 proceeding had been returned to the district court following denial of the stay, petitioner requested permission to retransmit the record to the court of appeals and to docket the appeal out of time or to consolidate the Section 2255 proceeding with the pending review proceeding (R. 50-51).

On September 12, 1972, the Service's motion to dismiss was granted without opinion (R. 52).

5. The court of appeals' disposition of the petition was appropriate and no question meriting further review is presented.

*a.* The dismissal of the second petition for review was a proper exercise of discretion. Although petitioner had filed a notice of appeal from the denial of the Section 2255 motion, he had not pursued it to final judgment. The only request he had made of the court of appeals with respect to the appeal had been to ask that his deportation be stayed. That motion had been denied and the record of the Section 2255 proceeding (which

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[1] The motion inadvertently referred to the date of the order as September 13, 1971. That was the date the order was filed in the district court (R. 39).

had been sent to the court of appeals for its consideration in connection with the stay request) had, with notice to petitioner's counsel, been returned to the district court. Petitioner had taken no further action until deportation had again become imminent. The court of appeals could properly have concluded in these circumstances that the filing of the second review petition was an abuse of the prescribed processes for securing review of a deportation order, and that to permit petitioner to docket his appeal substantially out of time would be inconsistent with the policy of preventing delays in the enforcement of deportation orders through dilatory tactics. See *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217.

*b.* In any event, petitioner's underlying claim—that his conviction is invalid—has no merit. In *Leary* this Court held only that a timely and proper assertion of one's privilege against self-incrimination is a defense to prosecution under former 26 U.S.C. 4744(a)(2) (see 395 U.S. at 27-29). The Court's discussion (*ibid.*) makes it plain that that defense could be waived. In the companion case to *Leary*, *United States* v. *Covington*, 395 U.S. 57, 59, the Court explained *Leary* as holding that the Fifth Amendment provides a defense to prosecution "unless the plea is untimely * * * or the privilege has been waived." And then in *United States* v. *U.S. Coin & Currency*, 401 U.S. 715, 723, the Court reiterated that the Fifth Amendment defense could be waived.

Here, petitioner orally acknowledged his awareness of a possible Fifth Amendment defense and expressly waived it in the presence of counsel. Petitioner obvi-

ously decided, after full advice, to waive a defense to the relatively less severe tax charge in order to avoid the substantial risk of conviction on the more serious counts, to which he had no Fifth Amendment defense.[8] In these circumstances, the plea of guilty constituted a knowing and understanding waiver of his Fifth Amendment defense, and petitioner should not be heard to attack the validity of the "bargain" he voluntarily struck. See *Brady* v. *United States*, 397 U.S. 742, 752-753, 756-758; *Henry* v. *Mississippi*, 379 U.S. 443, 449-452. See also *Palacios* v. *Britton*, No. 72-5460, leave to file petition for habeas corpus denied January 22, 1973.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

FEBRUARY 1973.

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[8] It is immaterial that petitioner's guilty plea, which was entered subsequent to the decisions in *Marchetti*, *Grosso*, and *Haynes* (see note 3, *supra*), was entered prior to the decision in *Leary*. See *Smedberg* v. *United States*, 448 F. 2d 401 (C.A. 5).

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